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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM—1949

No. 538

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* HAMPORTZOON CHOOLOKIAN,

Petitioner,

—against—

THE MISSION OF THE IMMACULATE VIRGIN and JOHN J. CORRIGAN, executive director, who is the person in charge thereof or having custody of the detained infants hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* HAMPORTZOON CHOOLOKIAN,

Petitioner,

—against—

THE NEW YORK FOUNDLING HOSPITAL and SISTER MARIE MADELEINE, superintendent, who is the person in charge thereof or having custody of the detained infant hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Introduction and Summary

In their zeal to build up some color of Federal claim, having no foundation in this record, petitioner's counsel have passed over, or mis-stated, most of the facts of this case, and have neglected to deal with the one fundamental question at issue.

The case involves the custody of three destitute minor children, native-born citizens of the United States and wards of the State of New York. Their alien mother, if still alive, is hopelessly insane. Because of the mother's insanity and his own inability to support his children, the father voluntarily surrendered them in 1942 to the New York City Department of Welfare, asking that they be placed in Catholic institutions.

At the trial in 1947 the father testified, and his counsel conceded, that he was still unable to support them. He felt, however, that if he took them with him to Soviet Armenia, the Soviet Government would somehow take care of them.

Accordingly, petitioner on November 1, 1947, boarded the S. S. Rossia in New York, executed a renunciation of his American citizenship, and disappeared with his insane wife behind the Iron Curtain. The children have not heard from either of them since.

Section 383 (1) of the Social Welfare Law of New York provides:

> "The parent of a child remanded or committed to an authorized agency shall not be entitled to the custody thereof, except upon consent of the court, public board, commission, or official responsible for the commitment of such child, or in pursuance of an order of a court or judicial officer of competent jurisdiction, determining that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child. The name of such child shall not be changed while in the custody of an authorized agency."

Under that Section the sole question for determination below was whether the welfare of these three wards of the

State of New York would be promoted by removing them from the foster care where two of them had spent nearly six years, and where the youngest had spent her entire life, and surrendering them to a father admittedly unable to provide for them, for permanent exile in the custody of the Soviet Government. The Department of Welfare declined to take the responsibility of making any such determination and left the matter to the courts of New York. Those courts, after full and careful consideration, and in the exercise of a reasonable discretion, unanimously found that the welfare of the children would not be promoted by the demanded change of custody, unanimously found the father unfit, and entered judgment accordingly.

That is all there is to this case. In their petition, and in the public press, petitioner's counsel have endeavored to befog the issue by injecting a series of extraneous and wholly unfounded arguments, and have endeavored to make the case appear as a personal conflict between an oppressed father and the sinister forces of religious and political intolerance and reaction. It is nothing of the sort. The sole question at issue, although petitioner's counsel never mention it, is what would be best for these three children. The courts of New York have done their utmost to solve that question of fact impartially and conscientiously. We submit their findings were right and should stand.

How any Federal question is presented passes all comprehension. It was established, and indeed in substance conceded below, that if the petitioner had asked the surrender of the children for the purpose of living with him in New York or in any other state of the Union, considerations of their welfare, and of his own unfitness, would have required a denial of his request. It is now claimed, however, that because he said he wanted to expatriate himself and

take them to Soviet Armenia, his request should have been granted as a matter of absolute Federal right, which neither the State of New York nor anyone else may dispute. That is the sole basis on which this Court is now asked to intervene.

ARGUMENT

POINT I

The sole question for judicial determination, the welfare of the children, here presents no Federal issue.

That a State, as *parens patriae*, has the right to protect the welfare of infants is axiomatic. The Court of Appeals of New York, speaking through Judge Cardozo, stated the principle thus:

> "The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless [citing cases]." *Finlay* v. *Finlay*, 240 N. Y. 429, 431 (1925).

Accordingly in New York

> "The Supreme Court, as the guardian of all infants, has inherent power, in a proper case, to take the custody of the child, even from its general guardian. [citing cases] The right of the general guardian is the same as that of the father, and must submit to the same regulation and control." *Matter of Lee*, 220 N. Y. 532, 539 (1917).

The same principle was thus laid down by the Court of Appeals for the Sixth Circuit in *Carqueville* v. *Woodruff*, 153 F. 2d 1011, 1012 (1946):

> "The right of a parent to the custody and control of his child is not absolute, but may be lost by agreement, misconduct or unfitness. [citing cases]"

In the present case, the question is not as to the power of the State or its courts to protect children by taking them away from their natural parents,—though even that power exists in appropriate cases. The question is as to changing the custody of children voluntarily surrendered years ago by their father because he could not then, and cannot now, provide for them.

Where such a change of custody is proposed, the sole issue is the welfare of the children. All other issues are either secondary or nonexistent. As petitioner's counsel himself stated at the trial (R. 42):

> "The rule to consider is the welfare, the physical well-being, the mental well being, of these children."

That was the sole issue so painstakingly considered and decided by the courts of New York. We submit it raises no Federal question.

Under Section 383(1) of the Social Welfare Law of New York (quoted *supra* p. 2), before the change of custody could be granted, one of two conditions must be fulfilled. Either the responsible public official (in this case the New York City Commissioner of Welfare) must consent to the change after finding that it will be for the best interest of the children; or a court of competent jurisdiction must determine both (a) that the interest of the children will be promoted by the change of custody *and* (b) that the parent

is "fit, competent and able" to duly maintain, support and educate them.

In the present case the Commissioner did not consent. The courts of New York upon the evidence unanimously found both (a) that the children's welfare would not be promoted by the proposed change of custody and (b) that the father is not "fit, competent and able" to duly maintain, support and educate them.

(a) *The facts leading up to the decision below.*

At the trial petitioner's counsel described as "an excellent job," and offered in evidence as his Exhibit 15, the voluminous file of the New York City Department of Welfare on the Choolokian family (R. 170-1). That file, with other exhibits, was omitted on his motion from the printed papers on appeal, under an order which provided that all such exhibits should nevertheless be considered a part of the appeal record and could be used or referred to on appeal (R. 400). The original file has accordingly been transmitted to the Clerk of this Court; and the most important part of it—the "Case History"—is submitted under separate cover* in printed form.

From the file of the Department of Welfare, and from the testimony at the trial, certain simple and undisputed facts were established.

The Choolokian family had been the concern of various public and private welfare agencies in New York City for some fifteen years. The family apparently first went on home relief in 1932 (C.H. 2). In 1937 four of the children

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* References to the printed transcript of the record are cited in this brief as "(R.)." References to the Department of Welfare's Case History, forming part of Petitioner's Exhibit 15, and submitted separately herewith, are cited as "(C.H.)."

were committed to institutions, but were subsequently released (C.H. 11).

Early in 1942, following the birth of her sixth and last child, the mother (who apparently was never naturalized, C.H. 49) exhibited symptoms of insanity. The father again asked for public help. A case worker from the Department of Welfare reviewed the record, visited and talked with the family, and summarized her findings as follows (C.H. 3):

> "The home conditions have always been described as rather deplorable, the family living in apartments badly in need of repairs. The home is sometimes described as 'filthy'. Mr. and Mrs. C. have had a long history of hospitalization at Bellevue. * * * Through the record we can observe a lessening interest in living independently of public aid. Mr. C. becomes less cooperative and indicated unwillingness to secure work."

Shortly afterwards the mother became hopelessly insane and was committed to a State mental hospital, where she remained until she was released to return with her husband to Soviet Armenia (R. 174; C.H. 6, 13, 32, 57).

With the mother insane, and the father out of work, something obviously had to be done. After extended interviews and discussions, the father surrendered his six children to the Department of Welfare, specifying that they be placed in Catholic institutions. (The question of religion is discussed further *infra* pp. 28-33.) The five older children were accordingly placed in March and April of 1942 with the respondent Mission on Staten Island. The youngest child Alice, then only a few weeks old, was transferred directly from Bellevue Hospital, where she had been born, to the respondent Foundling Hospital (C.H. 9).

The Department of Welfare continued to have contact with the problem. In August and September, 1946, having obtained what appeared to be a regular job, the father asked the Department to release his three older children, then ranging in age from 16 to 12. The Department granted his request (C.H. 38-40). He attempted to re-establish a home with these three, but was not too successful (C.H. 43-44, 49). The three younger children (subjects of this proceeding), then aged 11 to 5, remained in care of the respondent institutions.

The trial court correctly summarized the situation when it found (R. 393):

> "It is apparent that he has a genuine affection for the children but the misfortunes and difficulties of life have been too much for him to cope with and, as the numerous reports of the Welfare Department indicate, he has been confused and bewildered by a multitude of problems beyond his ability to solve. A reading of the voluminous records of the Department of Welfare also shows that the father has almost always had considerable difficulty in controlling the children."

Some time in the latter part of 1946 the father, apparently influenced by propaganda put out by the Soviet Government, conceived the idea of returning to Armenia. He broached the subject to his eldest daughter, who was at home. She thereupon ran away. At the trial the father testified on this subject as follows (R. 85):

> "Q. Did you talk to Susie about going back?
> A. That's right.
> Q. She didn't want to go back?
> A. That's right * * *.

Q. Why did Susie leave you?

A. Don't like to stay. He [she] don't like to go back or go Armenian or stay with me."

With the two other children then at home (aged 13 and 16), his persuasions were apparently more effective; and they accompanied him to Armenia on November 1, 1947. Since then there has been no communication from them.

The three younger children who are the subjects of this proceeding are George (now aged 14-1/2), Albert (now aged 13) and Alice (now just over 8). George and Albert have been in the care of the respondent Mission since March of 1942. Alice has been in the care of the respondent Hospital since birth.

The trial court questioned the father on the subject of the younger children as follows (R. 127):

"Q. Mr. Choolokian, have you talked with the two boys, George and Albert, about their going back to Armenia?

A. Yes. The kids I don't know they scared to tell me."

All of the Choolokian children, including these three, are native-born citizens of the United States and of the State of New York (R. 77). Not one of them (except, of course, the two who returned with the father) has ever been in Armenia. They can speak no Armenian. (*cf.* R. 80) Their entire upbringing and education have been in American schools. Their views about being sent to Soviet Armenia can best be gathered from their father's statement as to Susie running away and George and Albert being "scared to tell me."

Although the father had apparently been considering his return to Soviet Armenia for about a year (*cf.* R. 84; C.H. 49), it was not until October 24, 1947 that he notified the New York City Department of Welfare of his plans or made any attempt to regain custody of his three younger children (C.H. 45). The S. S. Rossia, chartered by the Soviet Government, was due to sail on November 1st, a week later. During that week there was a series of discussions by officials of the Department of Welfare and representatives of the two respondent institutions. Those discussions were the subject of considerable testimony at the hearing, and are recorded in the Department's Case History at pp. 45-60.

In petitioner's brief (p. 8; *cf.* p. 10) his counsel assert:

> "• • • the said Department of Welfare agreed to release the said children into his custody, and directed the two respondent institutions to deliver the said children into his custody."

This is an entirely erroneous statement of what actually happened, and is directly contrary to the findings of all the courts below.

What happened was this: Faced with the necessity of making a decision on an issue of such paramount importance to the future of its three young wards, the Department of Welfare did its best within the limited time available to ascertain what would be best for the children. It is the standard practice of the Department in all cases where a change of custody is proposed (including cases where it is proposed to take children to another city or to another state of the United States) to obtain specific information on the kind of care which they will receive in the place to which they are going, and to contact appropriate child-welfare or other agencies in the proposed new location (C.H. 51, 55; R. 358-9).

Accordingly the Department attempted without success to find out from the State Department, from the International Migration Service, from the so-called Volunteer Committee for the Repatriation of Armenians, and from the Soviet Consul, just what would happen to the children when they got to Armenia and what provisions had been made for their welfare (C.H. 46-50). The State Department replied in substance that it knew nothing about the scheme except that it had agreed to permit "persons of Armenian origin" to leave the United States without passports on the assumption and understanding that they were relinquishing their American citizenship and becoming Soviet citizens (R. 185-6; C.H. 59). The International Migration Service was unable to supply any information, and expressed its astonishment that the father would consider taking his children to Armenia (C.H. 52). The Treasurer of the Armenian Volunteer Committee said that the Department's request for information amounted to asking for "the impossible" since the Committee itself had been "unable to get any information from Soviet Russia" (C.H. 51). The Soviet Consul gave no information beyond stating in substance that passage was being paid by the Soviet Government, that everything would be wonderful in Soviet Armenia and that if the father could not take care of his children on arrival the Soviet Government would (C.H. 55, 56-7). On the basis of these vague assurances, the Department of Welfare on October 31st tentatively concluded to discharge the children to their father, and notified the two respondent institutions by telephone to prepare the children for discharge accordingly (R. 199, 239, 293-4, 298-9; C.H. 60). The "discharge slips" customary in such cases were not prepared (R. 212).

Before the Department's oral instructions could be carried out, the respondent institutions remonstrated over the

inadvisability of sending the children to permanent exile in Soviet Armenia, and stated that under the circumstances and on advice of counsel they would not feel warranted in releasing them without a court order (R. 279; C.H. 60). The Department of Welfare thereupon reconsidered its views, and decided to leave the matter to the courts (R. 258; C.H. 60). The previous oral instructions to the institutions to prepare the children for release were countermanded by telephone (R. 272-3, 294-5, 298-9); and the last entry on the Department of Welfare's Case History records a statement by the Deputy Commissioner "that no further action by the Department would take place". (C.H. 60) Petitioner's counsel on the evening of October 31st, 1947, thereupon sued out writs of habeas corpus returnable at 8:00 o'clock the following morning, the ship being due to sail at 10:00. He had threatened to sue out the writs some two days earlier (C.H. 52).

The matter came on for hearing before Mr. Justice Lumbard of the New York Supreme Court at 8:00 A. M. on November 1st, 1947. It being obviously impossible to hear the testimony and make a proper decision in a space of two or three hours, Mr. Justice Lumbard, after hearing the testimony of the father, suggested that he be permitted to depart as scheduled, with the understanding that his departure would not prejudice his rights, and that the matter of the children's custody should be determined after opportunity for more adequate consideration. This was agreed to (R. 135-6).

After further hearings, and the submission of briefs, Mr. Justice Lumbard handed down an opinion (R. 386; 192 Misc. 454) in which he held that the father was unfit and that it was for the best interests of the children that they should remain in the custody of the institutions where the

father had asked the Department to place them. He accordingly dismissed the writs. His decision on both facts and law was reviewed and unanimously affirmed by the Appellate Division without opinion (R. 406), and again unanimously, with two brief opinions, by the Court of Appeals* (R. 436).

(b) *The issues before the Courts of New York.*

These children were voluntarily surrendered, under the circumstances just outlined, by their father in early 1942 to the custody of the Department of Welfare of the City of New York. After full consideration and explanation he then signed the appropriate commitment papers required by the law of New York (R. 152; C.H. 20).

Only two questions were presented for determination by the trial court. Under Section 383(1) of the Social Welfare Law of New York (quoted *supra*, p. 2) those questions were:

> (1) Whether the Commissioner of Welfare (the "official responsible for the commitment of such child") had consented to the proposed change of custody.
>
> (2) If not, whether the court could properly determine (a) "that the interest of such child will be pro-

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* In dismissing the writs the trial court directed (R. 398):

> "The dismissal, however, is without prejudice to the right of the relator or any properly authorized person to make further application upon a showing that the rights of the children as American citizens would be protected and respected, that the interests of the children would be promoted by taking them to Soviet Armenia and that the father is fit, competent and able to duly maintain, support and educate the children in Soviet Armenia."

Any implied limitations thus imposed on future applications were stricken out by the Court of Appeals (R. 436), thus leaving the field entirely open for further claims by the petitioner at any time.

moted" by the change, *and* (b) "that such parent is fit, competent and able to duly maintain, support and educate such child".

(1) On the question of alleged consent by the Commissioner of Welfare, the evidence has been summarized above (pp. 10-12). At the trial, counsel for the Department of Welfare said (R. 52-3):

> "In this particular case there is no question but that if this man had asked at this moment for the return of the children to him in this country they would not have been returned because he is in no position financially to support them."

At R. 54-55 counsel for the Department of Welfare left the matter for determination by the court, saying:

> "If the agency [i.e. the respondent institutions] takes the position and is prepared to defend the position that it is not in the best interests of the children to release the children, we will not force the agency or attempt to force the agency to release the children and that is an issue which the Commissioner felt should be determined by the Court, particularly since we were in no position to argue pro or con on the issue;* * *"

The trial court accordingly found (R. 386):

> "The Commissioner of Welfare of the City of New York, who has been represented throughout these proceedings, has taken no position regarding this writ, and has held in abeyance his order for their release to join their father, stating that in view of the position taken by the Mission and the Hospital he would leave the matter for

decision by the court. Consequently, the Commissioner has not given the consent required by Section 383 of the Social Welfare Law".

(2) The trial court therefore went on to consider for itself the questions (a) whether the interests of the children would be promoted by surrendering them to the father for transportation to Armenia, and (b) whether the father was "fit, competent and able to duly maintain, support and educate" them. It decided both questions in the negative.

Both of these questions, we submit, were peculiarly questions of fact and of judicial discretion, properly determinable by the trial court which observed the parties and was in position to weigh and consider any possible conflicts in the evidence. Its findings are plain and unambiguous. They are fully supported by the record. They were unanimously affirmed by both of the appellate courts. They present no Federal question and nothing to warrant review by this Court. There is no claim of denial of procedural due process at any stage.

That the father was totally unable to support the children was unequivocally conceded twice by his counsel at the hearing. At R. 58 petitioner's counsel said:

"Let's get one thing definitely clear. We do not assert, nor have we ever asserted, that the relator here as he is now constituted is able properly to maintain the children. That is an undeniable fact, that he is not."

Again at R. 83 occurred the following:

"Mr. Coster [Counsel for the respondent Mission]:

Q. It is conceded that he cannot support these children himself?

> Mr. Blinken [Counsel for petitioner]: A. Well, now, I said that three-quarters of an hour ago."

After hearing considerable evidence on the subject, and after studying the entire Case History of the Department of Welfare (submitted by petitioner's counsel), the trial court accordingly found (R. 394):

> "In view of this background it is clear that if the father were now applying for the release of these three children to his care in New York City he could make no satisfactory showing that the interests of the children would be promoted by such release and that he is fit, competent and able to duly maintain, support and educate these three children, in addition to the three already intrusted to him, as is required by the Social Welfare law. This much was conceded by his counsel."

In his briefs in the lower appellate courts, petitioner's counsel vehemently denied that he had made any such concession. His own words, quoted above, are a sufficient answer to that denial.

But the matter does not rest on counsel's concession alone. The father himself testified that he had been unable to take care of the children (R. 73), that they were being well cared for at the respondent institutions (R. 78), that he had not saved any money and that he had no money at the time of the trial (R. 82). He had no plans as to what he was going to do when he got to Armenia, except that he hoped to find work as a shoemaker (R. 78-9). He testified that his passage was being paid by "all my organized Armenian office" (R. 82) and that he was giving up his American citizenship because "That is what it got to be" (R. 83).

An official of the Soviet Consulate, called as a witness by petitioner, testified in the vaguest of generalities that the Soviet Government would take care of everything and everybody once they reached Armenia, but added on cross-examination (R. 117):

> "In the case of Choolokian's children no special arrangements have been made."

When asked whether he had himself ever been in Armenia, the witness at first refused to answer and then admitted that he had been there once as a tourist in 1936 (R. 116-7).

A Bishop of the Armenian Church in America, likewise called by petitioner, testified that although in Soviet Armenia "All education is in charge of the State" (R. 264), there was complete religious freedom. He was not asked about other subjects. He gave his testimony on the basis of a month's trip to Armenia in 1945, during which he spent two weeks in a monastery and the other two weeks in the capital (R. 263).

The Vice-Chairman of the so-called Committee to Aid Repatriation of the Armenians testified that there was no unemployment in Armenia and that:

> "Upon returning to Armenia, most of these people, with very few exceptions, where the people are destitute or near it or not so well off to put it, they are taking machinery pertaining to their trade, equipment, tools and other belongings. So that upon reaching there, they will not have to depend upon anyone else for employment but themselves." (R. 92)

He testified that there was a committee which formed part of the Soviet Armenian Government which had "made

all arrangements for all of the 60,000 that returned last year and the 60,000 who are returning this year." (R. 97). He could not give the slightest clue as to what these "arrangements" were; and like the Soviet Consul he conceded that there were no specific plans for this particular relator or his children (R. 96). On cross-examination he admitted that he himself had come to this country in 1920 from Bulgaria and had never in his life been in Armenia (R. 94).

It is upon the basis of this testimony that petitioner's counsel now ask this Court to overrule the unanimous findings of all the courts of New York, and in effect to make an affirmative finding that this father, who voluntarily surrendered his children some eight years ago, and who admittedly could not support them either then or at the time of the hearing, is "fit, competent and able to duly maintain, support and educate" them. It is upon the basis of this testimony that petitioner's counsel now ask this Court to hold that a Federal question exists and to determine, again overruling the unanimous findings of all the courts of New York, that Federal law gives this petitioner the "absolute right" to "promote the interests" of these children by permanently exiling them from the land of their birth.

POINT II

The so-called Federal questions argued in the petition have no genuine foundation in this record.

As this Court held in *In re Burrus,* 136 U. S. 586, 593 (1890), in the absence of a genuine and substantial Federal question

> "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."

Cf. Carqueville v. Woodruff, 153 F. 2d 1011, 1012 (C. C. A. 6th 1946), and cases there cited.

We repeat that the sole question properly presented for judicial determination in this case is the welfare of these three helpless children.

We are deeply concerned with that question, as were the courts of New York within whose jurisdiction it belonged. Their findings, unanimously made after full hearing and in the careful exercise of their discretion, should stand.

Petitioner's counsel now assert an absolute Federal right to override any exercise of discretion by the New York courts, and to disregard any and all findings which those courts have made, or could make, on the sole question properly involved. In their request to amend the remittitur in the New York Court of Appeals, granted by that Court (R. 444), counsel asserted, and in their petition now assert, that petitioner has an

> "absolute right to recover custody of his children in order to take them with him to Soviet Armenia."

His claim to that "absolute right" is the only so-called "Federal question" presented here.

In support of that claim of absolute Federal right, counsel seek to evade the sole proper question of the children's welfare by presenting a whole series of so-called constitutional issues having no foundation in this record.

(a) ***The so-called issue of "interference with family life".***

Throughout their petition, counsel assert an absolute and overriding Federal right, superior to all other considerations, of *this* father on *this* record to the immediate custody of *these* children, whom he surrendered because he could not provide for them.

That the unity of the family and the normal rights of parents are superior to any claims of the State are propositions which neither the State of New York nor these respondent institutions have the slightest desire to dispute. That the State of New York has a right, and indeed a duty, to step in and make provision for children when the parents cannot do so seems to be disputed only by this petitioner's counsel.

It goes without saying that the rights of a father are not absolute and indefeasible, even when he is able to maintain a home. He cannot, for example, starve or maltreat his child, or sell him into slavery. If he does, the State may, and indeed must, step in and forcibly remove the child from the family roof. The same rights and duties of the State come into active operation when, as here, the father is concededly unable to maintain a home, and voluntarily surrenders his minor children to a State welfare agency.

Even then, however, the rights and duties of the State are exercised, as far as reasonably possible, in accordance with the parents' wishes as well as in the interests of the child. The whole record of the Choolokian family

with the Department of Welfare and the courts of New York shows a most painstaking effort by all concerned, often in the face of the most serious obstacles, to reconcile the welfare of the children with the rights and wishes of the parents.

It is against the background of that record and on the facts of this case, that the courts of New York found that the interests of these children would be best served by maintaining them in the institutions where this father himself had asked to have them placed.

(b) *The so-called issue of "the right to expatriation".*

That Hamportzoon Choolokian had a right under the Constitution and laws of the United States to leave our shores and return to Soviet Armenia is another proposition which the courts of New York have not denied, and which these respondents do not dispute.

His counsel, however, now assert that his right of expatriation is so absolute and so overriding that Federal law deprives the New York courts of all jurisdiction over their own wards, compels the State of New York to surrender the children whom he voluntarily placed in its care, and entitles him, as a matter of "absolute right," to take those children, native-born American citizens, to a place where, as the State Department and the courts have alike pointed out, their rights as American citizens will be incapable of protection, and from which they can never return* to claim their birthright.

In *Perkins* v. *Elg*, 307 U. S. 325 (1939) this Court adverted to the right of a native American citizen taken

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* At page 13 of the petition, on the basis of "judicial notice of matters of public notoriety," petitioner's counsel call the Court's attention to a statement appearing in the public press of November 2, 1947, in which a spokes-

abroad during minority by her parents to reclaim citizenship on attaining majority, and indicated that that right was so important and so precious that even a formal treaty with Sweden should not be construed as disparaging it. We refrain from making any comparison between Sweden and Soviet Armenia.

If there is one undisputed fact in this case, it is that at the time of the hearing Hamportzoon Choolokian was incapable of supporting his children. He so testified himself, and his counsel so conceded. Counsel for the Department of Welfare stated flatly that for that reason the Department would not have even considered releasing the children to him in New York.

Under the claim of "expatriation", his counsel now assert that although he had no right to reclaim his children to have them live with him in New York,—or for that matter in Connecticut or any other state—his mere statement of his intention to take them to Armenia gives him such a right, absolute and indisputable in terms. That

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man for the Committee to Aid the Repatriation of Armenians stated that about 30,000 Armenians residing in the United States had expressed their desire to return to Armenia. Nothing like that number actually went. There have been press reports since, including particularly one in the New York Times of March 14, 1948, on the unfortunate plight of those Armenians who thus returned.

The New York Times article (reproduced as an appendix to this brief) reports on the shooting or imprisonment of more than 450 repatriated Armenians who tried to escape, and refers as follows to the group which left with this petitioner on the S. S. Rossia:

> "One group of more than 150 Armenians from the United States is reported to be especially distressed. More than 90 per cent of them wish to return to the United States and almost all of the remainder are unhappy but cannot think of leaving because of family reasons."

The article adds that the attempts by these unhappy people to communicate with their embassies in Moscow have been blocked. This is fully in accord with the State Department's pronouncement at R. 384-5, discussed *infra* at pages 25-6.

"absolute right" is asserted in the face of a concession that he could not support his children and in the face of a finding by the trial court, affirmed on appeal, that there was no credible evidence as to how they would be supported in Armenia. In a nutshell, counsel now say that Hamportzoon Choolokian's right of expatriation is so broad, so overriding and so absolute as to preclude all other considerations, and that once he asserted his intention of going to Soviet Armenia the Federal Constitution interposed a barrier around the entire family, and prevented the courts of New York from determining, or even inquiring into, what was in the best interests of the children whom he had committed to the State's care.

We say that any such claim of Federal right is wholly unfounded. No such claim was made in the petitions for the writs of habeas corpus (R. 15-18, 24-26). No such claim was advanced in the trial court. On the contrary, the case was there litigated on what petitioner's own counsel asserted (R. 42) was the sole question properly before the courts,—namely what would be best for the children. It is conceded, and was established by the testimony, that the father would have had no right to regain them if he had stayed in the United States. The courts of New York simply decided that a right which was non-existent if the children were to stay in New York did not become "absolute", overriding and indefeasible when the father said he wanted to take them outside our jurisdiction.

(c) *The so-called issue of "treaty rights".*

Throughout the petition, counsel repeatedly assert that the painstaking efforts of the New York courts, the public authorities, and these respondent institutions, to protect the welfare of these unfortunate children constitute "a flagrant interference with the foreign relations of the

United States" and a violation of an alleged "compact or agreement" having "the force of a treaty".

What is this alleged "compact or agreement"?

In the first place, it is certainly a belated afterthought on the part of petitioner's counsel. The documents which they now assert to have constituted that "agreement" (Respondent's Ex. F and G, R. 383-5; *cf.* Petition, pp. 5-7), and upon which they now base almost their entire claim, formed no part of their evidence below. What is more, when we—the respondents—offered those documents in evidence, *petitioner's counsel strenuously objected that they were "incompetent, irrelevant and immaterial"; and they were admitted only over his objection and exception* (R. 341).

In the second place, the alleged "compact or agreement" on its face is nothing of the sort.

It consists of an exchange of notes between the Soviet Embassy and the State Department (R. 383-5).

On April 21, 1947, the Soviet Embassy wrote to the State Department (R. 383) advising simply that the Soviet Government had authorized the Government of Soviet Armenia to organize "the return of Armenians wishing to emigrate to their homeland", and asking the State Department to "render assistance to Armenians wishing to emigrate to their homeland in granting permission for their emigration, the export of property belonging to them, the relinquishment of foreign nationality, et cetera".

A month later, on May 28, 1947, the State Department replied (R. 384). This reply, which petitioner now asserts had "the force of a treaty", amounted in substance to a statement that the Soviet request was unnecessary, since the United States (unlike Soviet Russia) does not pursue the policy of detaining or imprisoning those of its citizens who wish to leave its territory. The operative provisions

(if they can be called that) of the State Department's reply were contained in this single paragraph:

> "American citizens, or alien residents of the United States except German or Japanese nationals, who desire to emigrate to the Soviet Union are freely permitted to do so. No exit visas are required, and such emigrants are at liberty to take their personal property with them. American citizens may voluntarily relinquish their American citizenship by making a formal declaration of allegiance to a foreign country in accordance with the laws thereof." (R. 384)

This is nothing more than a simple statement of existing American law. Indeed, petitioner's own counsel so described it when he said at page 45 of his brief in the trial court

> "The correspondence, now in evidence, shows simply that the State Department conformed to existing law."

For the same counsel now to call the same correspondence an international "compact or agreement", or to say that it has the "force of a treaty", is nonsense.

The State Department, however, went on to make some further remarks, which petitioner's counsel throughout this proceeding have been extremely anxious to forget, but which the trial court took occasion to consider. After stating that our Government "will interpose no objections to the departure of persons of Armenian origin from the United States to the Soviet Union", the State Department in forceful language reminded the Soviet Government of some ugly facts.

In the first place the State Department pointed out that "persons with claims to American citizenship" had

been forcibly removed to the Soviet Union from various countries of Eastern Europe and that

> "All efforts of the American Embassy in Moscow to obtain permission to interview these people with a view to establishing their American citizenship and arranging for their return to the United States have been fruitless." (R. 384-5).

In the second place the State Department pointed out that Soviet women married to American citizens "for many months, and in several cases years", had vainly sought permission to leave the Soviet Union in order to join their husbands in the United States. The Department added:

> "The continued refusal of the Soviet authorities to permit the departure of these wives of American citizens is incomprehensible to the Government and the people of the United States." (R. 385)

It was after alluding to this official pronouncement of our Government that the trial court pungently stated in its opinion (R. 389):

> "Probably at no other time in our history as a nation have we been confronted with a situation where our citizens have been treated virtually as prisoners by a foreign power with whom we are at peace." *

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* The remonstrances of the State Department and the remarks of the trial court about the "incomprehensible" policy of the Soviet Government in holding prisoners all those unfortunate enough to come within its clutches received dramatic confirmation, shortly after the trial, in the case of Mrs. Kasenkina. That lady, it will be recalled, was held prisoner *in New York City* by the same Soviet Consulate whose representative testified at the trial. She escaped only at the risk of her life by jumping out of a window, after the Consul General had flouted a writ of *habeas corpus*. The State Department thereupon demanded the recall of the Consul General; and the Soviet Consulates in New York and San Francisco were closed. (9 Dept. State Bull. 251-53, 408-9 (1948); New York daily papers of August 21 and 25, 1948) There is no American consular or diplomatic official today in Armenia, or anywhere else in Soviet territory outside Moscow. On the chances of escape from Armenia, cf. *supra*, p. 21, footnote.

And it was with this pronouncement of our Government in mind that the trial court went on to say (R. 390-1):

> "If the father were permitted in this case to take these three infant children to Soviet Armenia, it seems clear under present conditions that their right to avail themselves of the privileges of their American citizenship might be forever lost. It is unthinkable that an American court could permit this father to place his infant children in such an irretrievable position. While he may make that choice for himself, it will certainly not promote the best interests of the children, as this court is required to find by Section 383 of the Social Welfare Law, to permit the father or anyone to dissipate beyond redemption these priceless rights of the children. The exercise of these rights should not be left to the remote chance that they might some day before their twenty-third birthday be able to escape from Armenia and return to the United States."

The right of an American citizen to expatriate himself, so laboriously argued throughout the petition, we do not in the slightest degree dispute. That right existed and still exists, altogether apart from the State Department's letter which counsel now seek to dignify with the name of "treaty". That letter did not, and could not, either add to or detract from that right in the slightest degree. In the exercise of that right this petitioner left the United States over two years ago. What his counsel now seek, in the name of an international "compact or agreement", is to convert a simple statement of existing law by our State Department into an engine of oppression. In the name of "treaty rights", counsel now ask this Court to take unwilling native-born

American citizens, voluntarily surrendered by their father, from the custody in which he and the public authorities of New York have placed them and in which the courts of New York have said they should remain, and to ship them to a place from which, as the State Department has forcibly pointed out, there can be no return.

(d) ***The so-called issue of "religious interference".***

This issue was summarily but adequately disposed of at the close of the trial court's opinion (R. 397). We mention it only to refute the repeated mis-statements in the petition and supporting brief.

Throughout the petition, counsel seek to give the impression that this entire case is based on a sinister plot by the two respondent institutions to keep the children away from their father in order to "impose upon them" a Catholic upbringing. Nothing is further from the truth.

In order to safeguard religious rights when homes are broken up and the State is forced to step in, the Legislature of New York has enacted in Subsections (1), (2) and (3) of Section 373 of the Social Welfare Law that whenever a child is committed, surrendered, boarded out or placed for adoption, he must "when practicable" be placed in the custody of a person or institution "of the same religious faith as that of the child". Subsection (4) of Section 373 specifies that the provisions of the preceding subsections

> "shall be so interpreted as to assure that in the care, protection, adoption, guardianship, discipline and control of any child, its religious faith shall be preserved and protected."

The entire record of this case demonstrates the most careful efforts by both the public authorities and these

respondent institutions to comply with this mandate of the law and to follow and respect the frequently conflicting wishes of petitioner.

The Case History of the Department of Welfare shows that all of the Choolokian children except the youngest were originally baptized in the Armenian Church* (C.H. 18-19).

When the father on March 17, 1942 was on the point of surrendering his children to the public authorities, the Department of Welfare gave him "a complete explanation of the method of placing children according to religions" and told him that it would be necessary for him to give an affidavit setting forth his preference. At the end of this explanation the father

> "stated very emphatically that he did not wish his children placed as Protestants; that he was a Catholic and regardless of whether he believed in the Pope or not all his children must be placed in Catholic homes. He added that he would be willing to have all his children re-baptized in the Roman Catholic faith and was pleased to know that we had asked his opinion before making the placement." (C.H. 20)

He thereupon gave the Department of Welfare an affidavit indicating his desire for a Catholic placement (C.H.

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* The Armenian Church is one of the very ancient Christian communities of the East (R. 262). Like the Coptic Church of Egypt, it has been out of communion with both the Catholic and Eastern Orthodox churches since the Monophysite controversies of the fifth and sixth centuries. Cf. Encyclopaedia Britannica, s. v. "Armenian Church".

Petitioner was apparently a more or less nominal member of an Armenian congregation in New York. The Department of Welfare's Case History records a conference in 1942, when the Department's social worker suggested that he consult his priest on some of his family problems, and he replied that he went to church so seldom that he didn't know the priest's name (C.H. 24).

20). The children were accordingly committed to the respondent Mission and the respondent Hospital (C.H. 20). Indeed, in the two petitions for *habeas corpus* which initiated this proceeding, petitioner specifically alleged that he "voluntarily placed" the children "at the Mission of the Immaculate Virgin in Staten Island" and "at the New York Foundling Hospital" (R. 16, 25). It should be noted in passing that as far back as 1937 four of the children had undergone previous commitments to Catholic institutions with no apparent objections by either parent (C.H. 11).

On April 7, 1942 the respondent Foundling Hospital, to which the youngest child Alice had been transferred directly from Bellevue Hospital, where she had been born, reported to the Department of Welfare that on checking the records it had discovered that the older children had been baptized in the Armenian Church. According to the record of the Department of Welfare, the respondent Hospital, a Catholic institution,

> "added that father recognized the fact that he is not a Roman Catholic and although he had signed a baptismal consent for Alice and had desired to have her baptized in the Roman Catholic faith, they have hesitated to do this. For that reason they could not accept the five children and suggest that they are placed in an institution of their own faith." (C.H. 22)

Ten days later, on April 16, 1942, the father again called at the Department of Welfare, again claimed that he considered himself a Catholic, stated that he desired to have his children remain in a Catholic institution, and added

> "I do not want my children in a Protestant institution. I am glad you placed them in a Catholic institution." (C.H. 23)

This information was reported by the Department of Welfare to the Supervisor of the respondent Hospital. Again it was this Catholic institution which raised objections, the Supervisor stating

> "that they get many such requests, but must know that family will continue in the Roman Catholic teachings, before they baptize any children under their care to the Roman Catholic faith." (C.H. 23)

About two weeks later, on April 29, 1942, apparently as a result of discussions with a Protestant clergyman, the father seems to have changed his mind (C.H. 23). On May 1, 1942, he called at the Department of Welfare and stated that he wanted his children to remain members of the Armenian faith. On this occasion he

> "repeated that he is not a Protestant, does not want his children in an institution of that faith but does not want them in a Roman Catholic institution either." (C.H. 24)

The children were thereupon listed by the Department of Welfare for transfer away from the respondent institutions, but without success. In February 1943 the father reported to a case worker of the Department of Welfare that

> "he has since discussed the problem with his church members and learned that the Protestant religion would be more like his own." (C.H. 25)

The Department of Welfare, with the cordial assistance of the respondent institutions, thereupon made further efforts to transfer the children, but without success, since no Protestant institution could be found with vacancies.

The father's indecision apparently continued; and on April 19, 1944, he visited the Department of Welfare, where the situation was again explained to him, and he was told that since the respondent Mission was a Catholic institution it could not keep his children indefinitely, and that the Department was therefore still endeavoring to arrange a transfer. At this point the father "became very aggravated", said that he would not consent to their transfer as they were happy where they were, and asked to sign another affidavit giving his consent to have the children baptized as Catholics (C.H. 27). The representative of the Department of Welfare suggested that before doing this he consult the same Protestant minister whose advice he had previously followed. At that point the father said that the minister in question was no longer connected with the church and

> "furthermore this is a free Country where one can make one's own decision regarding his church therefore he does not feel it is necessary to consult with any one other than his children." (C.H. 27)

The children accordingly remained where they were. Six months later, on October 19, 1944, the father again signed affidavits asking to have the children baptized and reared as Catholics (C.H. 30). This was the last official entry with respect to their religious affiliation until the present controversy arose.

In the face of this record, placed in evidence by petitioner's own counsel, it is idle to contend, as counsel now do, that the children were "baptized in the Roman Catholic Church at the insistence of the said two institutions" or that the father's consent was extorted by force or fraud.

The trial court correctly summed up, and dismissed, the so-called "religious issue" as follows (R. 397):

> "While there was considerable testimony regarding the religious affiliation of the children it is not a consideration necessary to any determination here. Of course, the father may during the minority of the children determine for them the matter of their religious education and affiliation just as he has done in the past (Matter of Varinakis, 160 Misc., 13)."

In conclusion, we may point out, as petitioner's counsel did in his briefs in the lower appellate courts, that a separate and subsequent proceeding is now pending in the courts of New York to compel the transfer of these children from respondent institutions either to a Protestant orphanage or to an Armenian foster family. That proceeding has not reached the stage of final hearing; and it is of course complicated not only by the frequent vacillations of the father in the past, but by the practical difficulties of obtaining authentic evidence of his present wishes. The relief sought in those proceedings, and any decision to be rendered therein, should not affect the sole issue here, which is whether these American children should now be sent behind the Iron Curtain.

CONCLUSION

Stripped of all extraneous issues, mis-statements, and half truths, the facts in this case add up to the following:

(1) In 1942 the father surrendered these children to the custody of these respondent institutions, where they have been ever since and where, as the father himself admitted at the trial, they are well cared for.

(2) At the trial the father testified, and his counsel twice conceded, that he could not then support them.

(3) The courts of New York have unanimously found the father unfit.

(4) Since the trial his children have not heard from him.

(5) The children are all native-born American citizens, speak no Armenian, and have never been in Armenia. The youngest has never been in her father's care.

(6) The alien mother, when she left the United States, was hopelessly insane. She has not been heard from since.

(7) The oldest daughter, when confronted with the possibility of being taken to Armenia, ran away from home.

(8) The sole question for judicial determination is one of fact,—namely, what is best for the welfare of the children.

(9) That question has been carefully considered and unanimously determined by the courts of New York.

In the face of these facts petitioner's counsel now ask this Court to take jurisdiction and to hold that the Federal Constitution gives this father, unanimously determined by all the courts of New York to be unfit, an absolute right to take his American-born children away from the land of their birth and commit them to the custody of the Soviet Government. In the name of the Federal Constitution, petitioner's counsel now assert that he has an absolute right to override any and all findings of the New York courts and to force the exile of these American children to an unknown fate in a land from which there can be no return.

To enforce that asserted absolute Federal right, petitioner's counsel now request this Court to take jurisdiction. For such a request we submit there is no sound basis in fact, in law or in justice.

The petition for certiorari should be denied.

Dated, New York, N. Y.,
February 9, 1950.

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APPENDIX

Text of article in New York Times, March 14, 1948, page 25, columns 1 and 2.

ARMENIANS FIND NATIVE LAND A DISAPPOINTMENT ON RETURN

SOME TRY TO ESCAPE AFTER COMING BACK TO SOVIET REPUBLIC—CAMPAIGN CIRCLES GLOBE

BY C. L. SULZBERGER
Special to the New York Times

GENEVA, March 11—Since the end of the second World War, Moscow propaganda has been conducting a protracted campaign designed to induce immigration to the Soviet Republic of Armenia of the scattered refugees from this nation that has known no true independence since the heyday of its medieval glories.

Broadcasts from Moscow and Tiflis as well as propaganda material in the Armenian language prepared both in Moscow and in the republic's capital of Erivan have been circulated to Armenian colonies around the world.

This propaganda has had considerable effect among the Armenians in Turkey [who have received it by underground means], Lebanon, various European countries and especially France and the United States.

Special "repatriation ships" have taken hundreds of Armenians "back to the fatherland"—the Soviet Armenian Republic—during the past year.

What Has Become of Them?

What has become of these Armenians, who have been seeking contact with their compatriot descendants of the great medieval kingdoms of Ani, Aklat and Diarbekir?

For the first time this correspondent has received some accurate reports from Erivan and Leninakhan, the latter a principal town of Soviet Armenia that is situated on the main trunkline between Baku and Turkey.

According to this information, which may be classified as reliable, many "returning Armenians" have been extremely disappointed with the situation—especially living conditions—that they have encountered after having established their new homes.

So strong have been their feelings of distress that a large group of Armenians who had come from France—some reports fix the figure at more than 450—attempted to escape from the Soviet Union.

Several Were Shot

Some of this group succeeded in slipping across the border but most were forestalled. Several were shot and many more placed in forced-labor camps.

One group of more than 150 Armenians from the United States is reported to be especially distressed. More than 90 per cent of them wish to return to the United States and almost all of the remainder are unhappy but cannot think of leaving because of family reasons. This is the case despite the fact that Armenians from America receive favored treatment as compared with all other immigrants to the Caucasus republic.

The Soviet Union has been propagandizing this program of returning "foreign Armenians" to their "father-

land." Thus, for example, those coming from America received excellent accommodations on the Soviet steamship Russia and a highly touted reception when they landed at Batum.

Before moving to their new homes they were asked to write to their families still abroad, explaining the advantages of returning to their native land. These letters were used by Soviet authorities for propaganda purposes.

Letters for Propaganda

Thus the magazine Ogonek [which is printed in the huge Moscow plant of Pravda, Communist party newspaper] published pages of excerpts from these letters under the title, "From the World of Capitalist Slavery to Soviet Armenia."

However, according to informants, this initial outburst of sentimental enthusiasm soon cooled. Not only were the immigrants keenly disappointed by the low living standards they had encountered, but they were irritated by the resentment with which they had been greeted by their new Soviet Armenian neighbors.

Several instances of actual physical hostility are known to have occurred. These included attacks upon immigrants and slitting their clothing with razor blades. There were other cases of hurling rocks through the windows of their new homes.

Older residents of Soviet Armenia, whose towns are overcrowded and short on housing, grumbled, "We didn't ask you to come here."

In all fairness, there appears to be every indication that Soviet official authorities are trying to curb this native resentment and assist the newcomers. But it is difficult to

supervise this movement because it appears to arise from below.

The immigrant Armenians are said to feel especially disconsolate when they realize they are cut off from the outside world. Many have written to embassies and legations of nations they left. These communications have been returned from Moscow marked "unaccepted."